ALLIED CAPITAL SDN BHD

v.

MOHD LATIFF SHAH MOHD & ANOTHER APPLICATION

FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
RAHMAH HUSSAIN FCJ
RICHARD MALANJUM JCA
[CIVIL APPLICATION NOS: 08-32-1996 (W) & 08-34-1996 (W)]
3 SEPTEMBER 2004

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Whether Federal Court has jurisdiction to review its earlier decision - Whether such jurisdiction limited - Rules of the Federal Court 1995, r. 137*

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Application to review earlier decision of Federal Court - Burden upon the applicant*

The High Court made several orders on 6 February 1995 after a full trial in respect of the three suits filed thereat in 1986. The applicants appealed against those orders to the Court of Appeal. Their appeals were dismissed on 21 May 1996. The applicants then applied to the Federal Court for leave to appeal against the dismissal of those appeals. The applications were heard by Steve Shim (CJ Sabah and Sarawak) and Siti Norma Yaakob and Mohtar Abdullah FCJJ. On 12 April 2001, the Federal Court dismissed the application for leave to appeal to the Federal Court. The applicants then filed two new notices of motion, *inter alia,* praying for the order of the Federal Court dated 12 April 2001 to be set aside; and that they be given leave to appeal to the Federal Court against the whole of the order of the Court of Appeal dated 21 May 1996. The respondents applied to strike out the applicants' motions on the grounds that: (i) the Federal Court had no jurisdiction or power to set aside its order given on 12 April 2001 or to re-hear the said application; (ii) that the decision of the Court of Appeal became final and was no longer appealable when the Federal Court dismissed the applicants' application for leave to appeal on 12 April 2001; and (iii) that no circumstances existed to warrant the exercise by the Federal Court of its inherent power or discretion to review its decision given on 12 April 2001 and to re-hear the applicants' application for leave to appeal against the decision of the Court of Appeal. The primary issue in the instant proceedings was whether the Federal Court had the jurisdiction to hear the applicants' applications proper bearing in mind the grounds raised in the respondents' applications.

Held (allowing the applicants' notices of motion)
Per Rahmah Hussain FCJ & Richard Malanjum JCA delivering the majority judgment of the Federal Court:

[1] Rule 137 of the Rules of the Federal Court 1995 is the federal law that gives the Federal Court the inherent powers and hence jurisdiction to hear matters such as the applications proper herein. It is therefore not correct to say that the Federal Court has no jurisdiction to entertain any application which seeks an order to review its earlier decision. (p 364 g-h)

[2] Rule 137 RFC 1995 cannot be construed so as to limit the jurisdiction of this court only to situations where its earlier decision was a nullity either because the court making it was not properly constituted or was illegal or was lacking jurisdiction. In other words, the exercise of jurisdiction should not be confined to the standing of the coram that rendered the impugned decision. To limit therefore the application of r. 137 RFC 1995 to only certain situations would be tantamount to stifling the wide jurisdiction envisaged therein. (p 365 d-e)

[3] When invoking r. 137 RFC 1995 an applicant has the onerous task of establishing to the satisfaction of the Federal Court that on the facts, circumstances and the law as applied in the impugned decision in issue, it occasioned an injustice or abuse of process which needs to be rectified or prevented. It is on a case by case basis. It was not the intention of the Legislature when promulgating r. 137 RFC 1995 that every decision of the Federal Court should be subject to review. To do so would be anathema to the concept of finality in litigation. (p 366 b)

Per Abdul Hamid Mohamad FCJ (dissenting):

[1] Rule 137 RFC 1995 does give the inherent powers to the Federal Court for the purposes stated therein. However, the inherent power that the Federal Court possesses is limited to situations where the order is a nullity because the court making the order was not properly constituted. To take it too far would defeat the concept of finality of a judgment and will open flood-gates as has started to happen, even with the restrictive views that the court has taken so far. (p 360 b-d)

[2] The applicants clearly failed to satisfy the Federal Court that the order of 12 April 2001 was a nullity because of illegality or want of jurisdiction or that it was made by a court which was not properly constituted warranting the order to be set aside. The applicants were actually asking the Federal Court to re-open, re-hear and re-examine its decision which it clearly had no jurisdiction to do. (p 362 d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Mahkamah Tinggi telah membuat beberapa perintah pada 6 Februari 1995 selepas perbicaraan penuh 3 guaman yang difailkan dalam tahun 1986. Pemohon-pemohon merayu terhadap perintah-perintah tersebut ke Mahkamah Rayuan. Rayuan-rayuan mereka ditolak pada 21 Mei 1996. Pemohon-pemohon kemudiannya merayu ke Mahkamah Persekutuan untuk kebenaran merayu terhadap penolakan rayuan-rayuan tersebut. Pemohonan-pemohonan tersebut didengar oleh Steve Shim (HR Sabah dan Sarawak), Siti Norma Yaakob HMP dan Mohtar Abdullah HMP. Pada 12 April 2001, Mahkamah Persekutuan menolak permohonan untuk kebenaran merayu ke Mahkamah Persekutuan. Pemohon-pemohon kemudiannya memfailkan dua notis usul yang baru, antara lain memohon untuk perintah bahawa perintah yang dibuat oleh Mahkamah Perskutuan bertarikh 12 April 2001 diketepikan; dan mereka diberi kebenaran untuk merayu ke Mahkamah Persekutuan terhadap keseluruhan perintah Mahkamah Rayuan bertarikh 21 Mei 1996. Responden pula memohon untuk membatalkan usul-usul pemohon atas alasan antara lain adalah: (i) bahawa Mahkamah Persekutuan tidak mempunyai bidangkuasa atau kuasa untuk menolak perintah bertarikh 12 April 2001 atau untuk mendengar semula permohonan tersebut; (ii) bahawa keputusan Mahkamah Rayuan menjadi muktamad dan tidak boleh dirayu lagi apabila Mahkamah Persekutuan menolak permohonan pemohon-pemohon untuk kebenaran merayu pada 12 April 2001; dan (iii) bahawa tiada kewujudan keadaan yang mewajarkan Mahkamah Persekutuan menggunakan kuasa-kuasa sedia adanya atau budi bicaranya untuk mengkaji semula keputusan yang diberinya pada 12 April 2001 dan mendengar semula permohonan pemohon-pemohon untuk kebenaran merayu terhadap keputusan Mahkamah Rayuan. Isu utama di dalam kes semasa adalah samada Mahkamah Persekutuan mempunyai bidangkuasa untuk mendengar permohonan pemohon-pemohon sambil mengingati alasan-alasan yang dibangkitkan di dalam permohonan responden-responden.

Diputuskan (membenarkan permohonan pemohon)
Oleh Rahmah Hussain HMP & Richard Malanjum HMR menyampaikan penghakiman majoriti Mahkamah Persekutuan:

[1] Kaedah 137 Kadah-kaedah Mahkamah Persekutuan 1995 adalah undang-undang persekutuan yang memberi Mahkamah Persekutuan kuasa-kuasa sedia ada dan dari itu bidangkuasa untuk mendengar perkara-perkara seperti permohonan ini. Oleh yang demikian adalah tidak betul untuk mengatakan bahawa Mahkamah Persekutuan tidak mempunyai bidangkuasa untuk mendengar sebarang permohonan untuk perintah kajian semula keputusan terdahulunya.

[2] Kaedah 137 tidak boleh ditafsirkan sebagai menghadkan bidangkuasa Mahkamah hanya kepada keadaan dimana keputusan terdahulunya adalah satu pembatalan atau kerana Mahkamah tidak terbentuk secara betul atau menyalahi undang-undang atau kurang bidangkuasa. Dalam kata lain, penggunaan bidangkuasa tidak harus dihadkan kepada coram yang membuat keputusan tersebut. Dengan menghadkan penggunaan k. 137 kepada keadaan tertentu sahaja akan menyempitkan bidangkuasa yang luas itu.

[3] Apabila menggunakan k. 137 seseorang pemohon mempunyai yugas yang berat untuk membuktikan kepada Mahkamah Persekutuan bahawa pada fakta, keadaan dan undang-undang yang digunapakai dalam keputusan yang dipertikaikan, menyebabkan ketidakadilan atau menyalahgunaan proses yang perlu diperbaiki atau dihalangi. Ianya berdasarkan dari kes ke kes. Adalah tidak menjadi niat badan perundangan semasa menggubal k. 137 bahawa setiap keputusan Mahkamah Persekutuan tertakluk kepada kajian senula. Jika berbuat demikian, ianya akan bertentangan dengan konsep litigasi muktamad.

Oleh Abdul Hamid Mohamad HMP (menentang):

[1] Kaedah 137 memang memberi kuasa-kuasa sedia ada kepada Mahkamah Persekutuan untuk tujuan-tujuan yang dinyatakan didalamnya. Walau bagaimanapun, kuasa sedia yang ada pada Mahkamah Persekutuan terhad kepada situasi-situasi dimana perintah yang diberikan merupakan satu pembatalan kerana mahkamah yang membuat perintah tersebut tidak dibentuk dengan betul. Untuk membawanya lebih jauh akan bertentangan dengan konsep penghakiman muktamad dan ianya akan membuka pintu kepada lebih banyak kes, yang sekarang ini sudah pun ujud walaupun dengan padangan terbatas yang diambil mahkamah setakat ini.

[2] Pemohon dengan jelas gagal memuaskan Mahkamah Persekutuan bahwa perintah bertarikh 12 April 2004 itu adalah satu pembatalan kerana ianya tidak sah atau diluar bidangkuasa atau ianya diputuskan oleh mahkamah yang tidak dibentuk dengan betul yang mewajarkan keputusan itu diketepikan. Pemohon-pemohon sebenarnya memohon Mahkamah Persekutuan untuk membuka semula, mendengar semula dan memeriksa semula keputusannya, yang secara jelas mahkamah ini tidak mempunyai bidangkuasa untuk berbuat demikian.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Kobchai Sosthikul (Civil Appeal No: 02-14-1997 (P)) (Unreported) ***(refd)***

Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application [2001] 2 CLJ 253 FC ***(refd)***

Badiaddin Mohd Mohidin & Anor v. Arab Malaysian Finance Bhd [1998] 1 CLJ 393 FC ***(refd)***

Buildingcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd [1999] 4 CLJ 135 HC ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors [1985] 2 CLJ 453; [1985] CLJ (Rep) 196 SC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

MGG Pillai v. Tan Sri Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

Moscow Narodny Bank Ltd v. Ngan Chin Wen [2004] 2 CLJ 241 FC ***(refd)***

Muniandy Thamba & Anor v. DC Bank & Anor [1996] 2 CLJ 586 FC ***(refd)***

R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577 ***(refd)***

Sri Kelang Kota – Rakan Engineering JV Sdn Bhd v. Arab Malaysian Prima Realty Sdn Bhd [2003] 3 CLJ 349 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(a)
Courts of Judicature Act 1964, s. 78
Federal Constitution, arts. 121(2), 128, 130
Rules of the Federal Court 1995, r. 137

For the applicant - Dato' Pathmanathan (Murali Pillai & Sreether Sundaram); M/s Murali Pillai & Assoc & M/s Gideon Tan Razali Zaini

For the respondent - Raja Aziz Addruse (Liza Chan Sow Keng & Hema Markandan); M/s Liza Chan & Co

[Appeal from Court of Appeal, Civil Appeal No: W-02-109-1995; High Court, Kuala Lumpur, Suit No: C22-204-1986]

Reported by Andrew Christopher Simon

JUDGMENT

Abdul Hamid Mohamad FCJ (dissenting):

In this judgment, "applicants" refer to the applicants in notice of motion, encl. 74(a) in 08-32-1996(W) and applicants in notice of motion, encl. 61(a) in 08-34-1996(W).

As this court is only concerned with the issue of jurisdiction to set aside its own order, it is sufficient merely to set out the chronology of events leading to these applications.

In 1986, three suits were instituted in the High Court. On 6 February 1995, after a full trial, the High Court made various orders. The applicants appealed to the Court of Appeal. Their appeals were dismissed on 21 May 1996. The coram of the Court of Appeal then was Gopal Sri Ram JCA, Ahmad Fairuz bin Dato' Sheikh Abdul Halim JCA (as he then was) and Abdul Malek bin Haji Ahmad JCA.

The applicants then applied to this court for leave to appeal against the dismissal of those appeals. The applications were heard by Steve Shim (CJ Sabah and Borneo), Siti Norma Yaakob and Mohtar Abdullah FCJJ. On 12 April 2001, this court, dismissed the application for leave to appeal to this court. The court gave a written judgment reported under the name of *Allied Capital Sdn. Bhd. v. Mohamed Latiff bin Shah Mohd. & Another Application* [2001] 2 CLJ 253.

On 18 September 2003 the applicants filed two new notices of motion (encl. 74(a) in 08-32-1996(W) and encl. 61(a) in 08-34-1996(W) praying for the following orders:

1) the Order of the Federal Court made on 12th April 2001 dismissing the Appellant/Applicant's earlier Notice of Motion be set aside;

2) the earlier Notice of Motion be reheard;

3) the Appellant/Applicant be given leave to appeal to the Federal Court against the whole of the Order of the Court of Appeal dated 21st May 1996;

4) the Appellant/applicant be given leave to file and serve the Notice of Appeal within 14 days from the date of the Order giving leave;

5) all execution proceedings relating to the Order of the Court of Appeal dated 21st May 1996 and the High Court dated 6th February 1995 be stayed until final decision of the Federal Court;

6) the costs of this application be costs in the said appeal; …

Subsequently, the respondents, on 21 November 2003, filed two notices of motion (encl. 76(a) in 08-32-1996(W) and encl. 63(a) in 08-34-1996(W)) praying for the applicants motions to be struck off on the following grounds:

(a) that the application which the Respondent purport to make to this Court by the said Notice of Motion is an abuse of process;

(b) that this Honourable Court has no jurisdiction or power to set aside this order given on 12.4.2001 (dismissing the Respondent application for leave to appeal against the decision of the Court of Appeal made on 21.5.1996 in the said matter) or to re-hear the said application;

(c) that the decision of the Court of Appeal became final and was no longer subject to any further appeal when this Honourable Court dismissed the Respondent's said application for leave to appeal on 12.4.2001;

(d) that no circumstances exist to warrant the exercise by this Honourable Court of its inherent power or discretion to review its decision given on 12.4.2001 and to re-hear the Respondent's said application for leave to appeal against the decision of the Court of Appeal.

(2) the costs of this application be borne by the Respondent and/or the solicitors for the Respondent; and

(3) such further and/or other reliefs and/or orders as this Honourable Court may deem fit and proper.

At the hearing we decided to hear the respondent's applications first on the jurisdictional issue. But, to avoid confusion, in this judgment, I shall refer to the applicants in original applications as "applicants".

What must be stressed is that the applications before us are first, to set aside the order of this court dated 12 April 2001 and, if they succeed, for this court to rehear their other applications for leave to appeal against the Court of Appeal judgment on 21 May 1996 to this court. So, they have to cross the first hurdle first ie, to set aside the order of this court dated 12 April 2001.

The applicants admitted that they were not alleging that this court that made the order of 12 April 2001 was not properly constituted. Neither do they allege bias on the part of any of the judges who made the order. The allegation of bias is against Gopal Sri Ram JCA who was a member of the coram of the Court of Appeal that dismissed their appeal on 21 May 1996. But, that is not an issue yet before us. That will be an issue at the hearing of the applications for leave to appeal and, if leave is granted, at the hearing of the appeals. At this stage the only issue is whether the order of this court dated 12 April 2003 should be set aside.

In the course of the submission, the only ground that learned counsel for the applicants could come up with was that the earlier coram of this court had not had the advantage of considering subsequent decisions of this court and also the courts in England.

Now, let us look at the cases. In *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn. Bhd. & Ors* [1985] 2 CLJ 453; [1985] CLJ (Rep) 196 (SC) the applicants applied by motion for an order that the judgment of the Supreme Court in the civil appeals, in which they were respondents, be reviewed.

The court held:

> Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular sub-section (3) of section 42. The other exception is as provided under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.

The next case is *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61. The judgment in that case was delivered on 10 August 2001. In that case, the judgment of this court allowing the appeal from the Court of Appeal was pronounced by the deputy registrar on 22 December 2000. But, as on that day, out of the three judges who heard the appeal, two of them had retired, leaving only one. This court held that as the effective date of the judgment was the date of its pronouncement in open court ie, 22 December 2000 and on that day only one out of the three judges who heard the appeal was still in service (the other two having retired earlier), on the date of the pronouncement of the judgment, the court was not properly constituted. So, the application to set aside the order of 22 December 2000 was allowed.

The next case is *MGG Pillai v. Tan Sri Vincent Tan Chee Yioun* [2002] 3 CLJ 577. The judgment was delivered on 16 May 2002. In that case, this court heard the appeal on 12 and 13 January 1998 and judgment was reserved. On 12 July 2000, the judgment of the court by Eusoff Chin, the then Chief Justice and also the presiding judge, was read out by the senior assistant registrar. At the time of the delivery of the judgment, Chong Siew Fai CJ (Sabah & Sarawak) had retired from the bench on 2 July 2000. Both he and Wan Adnan, the then Chief Judge (Malaya), the other member of the panel, had intimated their approval to the written judgment of the Chief Justice. The applicant applied by way of motion to set aside the judgment on the grounds that: (i) the

judgment was invalid as it was delivered by an improperly constituted court; and (ii) the judgment was tainted by apparent bias on the part of the presiding judge. The respondent responded by filing a motion to strike out the applicant's motion on grounds of irregularities. (I am omitting reference to the "third motion" filed by the applicant as it is not relevant to the present discussion).

This court, by a majority, allowed the applicant's application and dismissed the respondent's application. In other words, the judgment of this court pronounced on 12 July 2000 was set aside. Both Siti Norma Yaakob FCJ and Haidar Mohd. Noor FCJ (as he then was) held that as the effective date of the judgment was the date of its pronouncement in open. The court followed *Chia Yan Tek (supra)*, and held that since there were only two judges remaining on that day, and as no consent was given by the parties to the proceedings pursuant to the requirement of the preamended s. 78 of the Courts of Judicature Act 1964 ("CJA 1964") which was the law applicable in that case, for the proceedings to be continued by the remaining two judges, the judgment "was ineffective and invalid as the court was not properly constituted," per Siti Norma Yaakob FCJ at p. 604 of the law report.

Steve Shim CJ (Sabah and Sarawak) dissented on this point. He was of the view that the judgment was "not vitiated", on two grounds. First, he was of the view that "the need for consent of the parties (as provided by s. 78 CJA 1964 – added) is confined to the continued hearing as opposed to the concluded hearing of the proceeding before the remaining panel of judges." The learned Chief Judge (Sabah and Sarawak) went on to say:

> Thus, on a proper construction, it must necessarily mean that where the actual hearing of a case is still continuing at the time of the inability of any judge, either through illness or any other cause, consent of the parties is required before the said hearing can be continued or proceeded with. Here, however, the hearing of the case had already been concluded or completed pending judgment or reserved judgment at the time of the said inability, no consent is needed.

Secondly, the learned Chief Judge was of the view that s. 78 was a "contingency provision":

> It provides for a contingency to wit, inability of a judge, through illness or any other cause, to attend the proceedings, or otherwise exercise his judicial functions. It comes into play only when the contingency occurs …

> In the instant case, the contingency occurs on 4 July 2000 when Chong Siew Fai (Sabah and Sarawak) retired. At the time, the new s. 78 applied. The right to consent provided under the old s. 78 did not apply. It is not disputed that at the time when Chong Siew Fai CJ (Sabah and Sarawak) retired, there were two other panel members still in office, ie Eusoff Chin Chief Justice and Wan Adnan CJ (Malaya). That being so, the amended s. 78(1) is clearly applicable because it specifically provides that the reserved judgment shall be given by the remaining judges not being less than two. Here, the reserved judgment was delivered on 12 July 2000 when both of the remaining judges were still in office. I therefore find no merit in the second approach propagated by counsel for the applicant. For the reasons stated, I hold the view that the Federal Court was properly constituted at the time the reserved judgment was delivered. That judgment is therefore not vitiated.

The applicants in the instant applications relied on the judgment of Steve Shim, Chief Judge (Sabah and Sarawak) in which while agreeing with *Lye Thai Sang & Anor*, he said:

> Quite clearly, that observation was made in the context of the proper construction to be placed on s. 69(4) of the CJA. But that cannot be read to mean that the Supreme Court had been deprived of its inherent jurisdiction derived under the common law by virtue of s. 3(1)(a) of the Civil Law Act 1956, read with art. 121(2) of the Constitution. This is the common law exception quite apart from the statutory exceptions referred to in *Lye Thai Sang*. In any event, the Federal Court has now been conferred with inherent power under r. 137 of the Rules of the Federal Court 1995. This had also been reiterated very recently by the Federal Court in the case of *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61 wherein Mohamed Dzaiddin Chief Justice said:
>
> > Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice.
>
> For the reasons stated, I hold the view that the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to reopen, rehear and reexamine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. In the circumstances, the preliminary objection raised by counsel for the respondent fails.

With respect, I do not think that s. 3(1)(a) of the Civil Law Act 1956 is applicable. That section begins with the words: "Save so far as other provision has been made or may hereafter be made by any written law in Malaysia …" The jurisdiction of this court is not only provided by "written law" but by the Constitution itself – see arts. 128 and 130. More detailed provisions regarding the jurisdiction of this court are to be found in the CJA 1964 and the Rules

of the Federal Court 1995. In the circumstances, we do not think that we can invoke the provision of s. 3(1)(a) of the Civil Law Act 1956 to generally introduce whatever additional jurisdictions the common law gives to the courts in England.

However, I agree that r. 137 does give the inherent powers to this court for the purposes stated therein. I also agree with the statement of Mohamed Dzaiddin, CJ in *Chia Yan Tek (supra)* quoted by the learned Chief Judge (Sabah and Sarawak), as a general statement. However, I am of the view that that statement should be read in the light of the facts of that case. In other words, the inherent powers that this court possesses is limited to situations where the order is a nullity either because the court making the order was not properly constituted as in *Chia Yang Tek (supra)* or *M.G.G. Pillai (supra)* (majority judgment), or on ground of illegality or lack of jurisdiction, as in *Muniandy a/l Thamba & Anor v. D.C. Bank & Anor* [1996] 2 CLJ 586 (FC) and *Badiaddin bin Mohd. Mohidin & Anor v. Arab Malaysian Finance Berhad* [1998] 1 CLJ 393 (FC). To take it too far would defeat the concept of finality of a judgment and will open flood-gates as has started to happen, even with the restrictive views that the court has taken so far. The instant application is one such example.

Perhaps I should make brief reference to *Muniandy (supra)*, *Badiaddin (supra)* and *Sri Kelang Kota – Rakan Engineering JV Sdn. Bhd. v. Arab Malaysian Prima Realty Sdn. Bhd.* [2003] 3 CLJ 349, cited by learned counsel for the applicants.

Muniandy (supra) merely says that the court has inherent power to set aside an order which is a nullity. There is not even a suggestion that the order of this court dated 12 April 2001 is a nullity.

So is *Badiaddin (supra)*, where, Mohd. Azmi FCJ said that one special exception to the general rule that a High Court cannot set aside a final order regularly obtained form another High Court of concurrent jurisdiction is that where the final judgment of the high Court could be proved to be null and void on ground of illegality or lack of jurisdiction.

Sri-Kelangkota – Rakan Engineering JV Sdn. Bhd (supra) concerns the granting of leave to appeal to this court. This court having granted leave, heard the appeal. The appeal was decided on its merits. Having decided that there were no merits in the appeal, at the end of the judgment Abdul Malek Ahmad FCJ, delivering the judgment of the court said:

> Despite that, in the light of the authorities, we would hold that we are not prevented from reconsidering the issue of leave again. Coming back to the questions formulated for determination by this court, it is our view that the questions merely relate to the set of facts in the appeal and the application of the settled principles of law as it plain from the judgment of the Court of Appeal. As such, they do not come within the ambit of s. 96(a) of the CJA and, therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.

Similar situation also arose in *Moscow Narodny Bank Ltd. v. Ngan Chin Wen* [2004] 2 CLJ 241. Abdul Malek Ahmad FCJ (who also wrote the judgment of the court in *Sri-Kalangkota–Rakan (supra)*), who was himself a member of the panel that granted leave to appeal, having heard the appeal on merits, in his judgment observed:

> Upon full analysis at the hearing of this appeal I now realise that may be the question should not have been allowed as in deciding the question in the Ernest Cheong appeal, this court had to decide when is the date the interest becomes due.

But, that statement is confined to such a situation ie, where having heard the full argument on the merits of the appeal, it became clear to the court, that there was really no question of general principle within the meaning of s. 96(a) CJA 1964. In such a situation the court may decline to answer the question.

This is not such a case. In these applications, this court had refused leave. These applications are to set aside that order refusing leave. If at all it may succeed, it is only on the ground that that order is a nullity on the ground of illegality or lack of jurisdiction or because the court making the order was not properly constituted.

In the instant applications, there is no allegation that the panel of this court that made the order of 12 April 2001 was wrongly constituted or that the order was a nullity on ground of illegality or lack of jurisdiction. The only ground put forward is that this court when hearing the application for leave and making the order of 12 April 2001 did not have the benefit of considering subsequent decisions, including, the House of Lords decision in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* [1999] 1 All ER 577.

First, it is not correct to say that this court when deciding the application for leave to appeal did not consider *Pinnochet Ngarte* case. That can be seen from the judgment of this court – see [2001] 2 CLJ 253.

Secondly, the principle of that case is not relevant at this first stage in these applications. In that case, the allegation of bias was against one of the judges that made the order sought to be set aside. In the instant applications, there is no such allegation against any of the judges of this court that made the order of 12 April 2001. The allegation of bias is against one of the judges of the Court of Appeal. That had been considered by this court when it heard the motion for leave culminating in the order of 12 April 2001. Before us, we have not reached that stage yet. We are only considering whether that order of 12 April 2001 should be set aside. Any allegation of bias will only be relevant if it is directed against at least one of the judges who made the order. There is no such allegation against any of them.

Thirdly, it is trite law that a matter is decided in accordance with the law then in force. Just because the court subsequently takes a different view, or the law has been amended subsequently does not give the right to a party who had lost the case earlier to re-litigate the case. Otherwise there will be no finality to any judgment, whatmore of the apex court.

The applicants have clearly failed to satisfy this court that the order of 12 April 2004 is a nullity because of illegality or for want of jurisdiction or that it was made by a court which was not properly constituted that warrants the order to be set aside. The applicants are actually asking this court to re-open, re-hear and re-examine its decision which this court clearly has no jurisdiction to do.

For these reasons, the respondents' applications (encl. 76(a) in 08-32-1996(W) and encl. 63(a) in 08-34-1996(W) should be allowed with costs and the deposit is hereby ordered to be paid to be refunded to the respondents.

Rahmah Hussain FCJ & Richard Malanjum JCA (majority):

There are before this court two applications of similar nature (encl. 74(a) and encl. 61(a)) (the applications proper) filed on 18 September 2003 by the applicants pursuant to r. 137 of the Federal Court Rules 1995 in relation to two Federal Court Civil Appeals Nos. 08-32-1996 (W) and 08-34-1996 (W) respectively.

The applications proper were filed following the dismissal by this court on 12 April 2001 the application by the applicants for leave to appeal against the decisions of the Court of Appeal rendered on 21 May 1996.

And the appeals to the Court of Appeal came about after the High Court made several orders on 6 February 1995 after a full trial in respect of the three suits filed thereat in 1986.

In the applications proper the applicants seek for the following orders, *inter alia*:

(1) the Order of the Federal Court made on 12th April 2001 dismissing the Appellant/Applicant's earlier Notice of Motion be set aside;

(2) the earlier Notice of Motion be reheard;

(3) the Appellant/Applicant be given leave to appeal to the Federal Court against the whole of the Order of the Court of Appeal dated 21st May 1996;

(4) the Appellant/Applicant be given leave to file and serve the Notice of Appeal within 14 days from the date of the Order giving leave;

(5) all execution proceedings relating to the Order of the Court of Appeal dated 21st May 1996 and the High Court dated 6th February 1995 be stayed until final decision of the Federal Court;

(6) the costs of this application be costs in the said appeal.

However, pending the hearing of the applications proper the respondents filed two notices of motion (encl. 76(a) in 08-32-1996 (W) and encl. 63(a) in 08-34-1996 (W) (subsidiary applications) praying for an order that the applications proper be struck off on the following grounds, *inter alia*:

(a) that the application which the Respondent purported to make to this Court by the said Notice of Motion is an abuse of process;

(b) that this Honourable Court has no jurisdiction or power to set aside this order given on 12.4.2001 (dismissing the Respondent application for leave to appeal against the decision of the Court of Appeal made on 21.5.1996 in the said matter) or to re-hear the said application;

(c) that the decision of the Court of Appeal become final and was no longer subject to any further appeal when this Honourable Court dismissed the Respondent's said application for leave to appeal on 12.4.2001;

(d) that no circumstances exist to warrant the exercise by this Honourable Court of its inherent power or discretion to review its decision given on 12.4.2001 and to re-hear the Respondent's said application for leave to appeal against the decision of the Court of Appeal.

At the outset of the hearing of the applications proper it was agreed that the subsidiary applications should be heard first and the jurisdictional issue determined.

Thus the primary consideration in this judgment is whether this court has the jurisdiction to hear the applications proper bearing in mind the grounds raised in the subsidiary applications.

In the event that the jurisdictional issue is determined in the affirmative for the applicants, the next stage will be for the applications proper to be heard on their merits.

In retrospect it would have been more advantageous in term of time and convenience if the applications proper and the subsidiary applications were heard together.

Rule 137 of the Federal Court Rules 1995 reads:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

It is obvious that although the rule is declaratory of the inherent common law powers of the court to prevent injustice or to prevent an abuse of the process of the court such move may have been necessary in view of art. 121(2) of the Federal Constitution which reads:

> 2) There shall be a court which shall be known as the Mahkamah Perseketuan (Federal Court) and shall have its principle registry in Kuala Lumpur and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) …;.
>
> (b) ...; and
>
> (c) such other jurisdiction as may be conferred by or under federal law.

Accordingly, as the law presently stands r. 137 is the federal law that gives this court the inherent powers and hence jurisdiction to hear matters such as the applications proper.

It is therefore not correct to say that this court has no jurisdiction to entertain any application which seeks for an order to review its earlier decision. There are decisions of this court made in the exercise of its inherent powers as stipulated in r. 137. (See: *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61; *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577).

In *Chia Yan Tek & Anor (supra)* at p. 72 Mohd. Dzaiddin CJ declared:

> Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice. The issue of reopening or reviewing our own decision in the instant case therefore does not arise.

In passing we are conscious of the on-going debate on the issue of whether art. 121(1), (1B) and (3) of the Federal Constitution have done away with the common law inherent powers and jurisdiction of the courts in this country. (See: *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd)* [2002] 1 CLJ 645; *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun (supra)*; *cf. Filotek Trading Sdn Bhd v. Buildingcon-Cimaco Concrete Sdn Bhd* [1999] 4 CLJ 135). But we need not have to dwell on that point in this judgment.

In addition we are of the view that r. 137 cannot be construed as to limit the jurisdiction of this court only to situations where its earlier decision is a nullity either because the court making it was not properly constituted or being illegal or lack of jurisdiction. In other words the exercise of jurisdiction should not be confined to the standing of the coram that rendered the impugned decision. Surely the phrase 'to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court' is wide enough to encompass circumstances beyond those stated situations. To limit therefore the application of r. 137 to only certain situations would tantamount to stifling the wide jurisdiction envisaged therein. The foundation of the jurisdiction of this court under r. 137 is to 'prevent injustice or to prevent an abuse of the process of the court'. (See: *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas (supra)*).

No doubt the judicial pronouncements thus far on the said Rule appear to confine mainly on 'coram failure' situation hence ruling as being nullity the earlier decisions in issue. But these authorities in our view are merely instances on the application of the rule. They should not be read as having set down the parameters on the jurisdiction of this court in the context of the said rule.

In the subsidiary applications the grounds relied upon for asking the applications proper to be struck off are that the decision of the Court of Appeal had become final after the refusal of leave, that there was no longer any right of appeal against the decision of the Court of Appeal once the application for leave had been dismissed and that upon dismissal of the application for leave this court is *functus officio.*

With respect there is nothing in r. 137 indicating that such grounds are sufficient for the applications proper to be dismissed in limine without having to hear the merits.

Ultimately when invoking r. 137 an applicant in our view has the onerous task of establishing to the satisfaction of this court that on the facts, circumstances and the law as applied in an impugned decision in issue, it occasioned injustice or abuse of process which need to be rectified or prevented. Hence we would think that it is on a case by case basis. And we hasten to add that we do not think it was the intention of the legislature when promulgating r. 137 that every decision of this court is subject to review. To do so would be anathema to the concept of finality in litigation.

Just recently this court declined jurisdiction to hear an application made under r. 137. (See: *Adorna Properties Sdn. Bhd. v. Kobchai Sosthikul* (Rayuan Sivil No. 02-14-1997 (P)). But in that case it was obvious that that was the second time the applicant applied under r. 137 in respect of the same judgment of this court *albeit* on a different ground. Moreover it was not shown and even if it had been, the court was not convinced that the application of the law in the impugned judgment had occasioned grave injustice. There this court was also concerned with the attitude of the applicant venting his complaints against the impugned judgment by way of instalment in addition to the fact that there was a considerable lapse of time between the first and second applications.

The present applications proper however are the first attempt by the applicants to set aside 12 April 2001 decision of this court. Further the impugned decision is only on refusal of leave to appeal and not a substantive judgment. And views have been expressed in substantive judgments of this court where in retrospect having heard the merits of the appeal proper it was felt that the grant of leave to appeal should not have been made in the first place. Thus, if the grant of leave to appeal could be subsequently doubted there is no reason why the converse should not be permitted. And one way is the application of r. 137.

(See: *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349; *Moscow Narodny Bank Ltd. v. Ngan Chin Wen* [2004] 2 CLJ 241).

Thus, for the foregoing reasons we rule that this court has jurisdiction to hear the merits of the applications proper. The subsidiary applications are therefore dismissed with costs. And we hereby order that the applications proper be fixed for hearing accordingly.